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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

8 Lisa A. Denunzio,) No. CV 17-231-TUC-LAB

9 Plaintiff,) **ORDER**

10 vs.)

11 Nancy A. Berryhill, Acting Commissioner)
12 of the Social Security Administration,)

13 Defendant.)

14 _____
15 The plaintiff filed this action for review of the final decision of the Commissioner for
16 Social Security pursuant to 42 U.S.C. § 405(g). (Doc. 1, pp. 1-2)

17 The Magistrate Judge presides over this case pursuant to 28 U.S.C. § 636(c) having
18 received the written consent of both parties. *See* FED.R.CIV.P. 73; (Doc. 14)

19 The ALJ in this case failed to give specific and legitimate reasons for discounting the
20 opinion of the treating physician. The ALJ also failed to give clear and convincing reasons for
21 discounting the claimant's subjective testimony. The case is remanded for payment of benefits.

22
23 PROCEDURAL HISTORY

24 In August of 2011, Denunzio filed applications for disability insurance benefits and for
25 supplemental security income pursuant to Title II and Title XVI of the Social Security Act
26 respectively. (Tr. 172-182) She alleged disability beginning on November 1, 2009, due to
27 bipolar disorder, anxiety, depression and mood swings. (Tr. 203)

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1 Her applications were denied initially (Tr. 116-123) and upon reconsideration (Tr. 126-
2 132). Denunzio requested review and appeared with counsel at a hearing before Administrative
3 Law Judge (ALJ) Norman R. Buls on January 16, 2013. (Tr. 60) In his decision, dated April
4 4, 2013, the ALJ found Denunzio was not disabled because her mental impairment was not
5 severe. (Tr. 24-34) Denunzio appealed, and on June 3, 2014, the Appeals Council denied
6 review making the decision of the ALJ the final decision of the Commissioner. (Tr. 1-3)
7 Denunzio sought review in District Court, and on May 18, 2015, this court reversed and
8 remanded the action to the Commissioner for further proceedings. (Doc. 480-509)

9 On May 9, 2016, Denunzio appeared with counsel before ALJ Charles Davis. (Tr. 407-
10 435) In his decision, dated October 18, 2016, the ALJ found Denunzio was not disabled
11 because there are some jobs in the national economy that she can perform despite her
12 limitations. (Tr. 387-400) Denunzio appealed, and on March 20, 2017, the Appeals Council
13 denied review making the decision of the ALJ the final decision of the Commissioner. (Tr. 377-
14 380) Denunzio subsequently filed this action appealing that final decision. (Doc. 1)

15

16 Claimant's Work History and Medical History

17 Denunzio was born in June of 1964. (Tr. 42) She was 52 years old when ALJ Davis
18 issued his decision in October of 2016. (Tr. 63, 400)

19 Denunzio has a high school education. (Tr. 64) She last worked in 2009, when she was
20 employed as a stocker and cashier. (Tr. 65-66) “[S]he was dismissed from her job for not
21 showing up after periods of depression.” (Tr. 373) “[S]he has gotten into verbal confrontations
22 with supervisors in the past.” (Tr. 373) Denunzio received unemployment benefits for a period
23 of time after her dismissal. (Tr. 66)

24

25 *Mental Impairment*

26 In December of 2011, Andres Kerns, Ph.D., reviewed the medical record for the
27 disability determination service and offered an opinion of Denunzio’s mental impairment. (Tr.
28 78, 79, 84) Kerns diagnosed Denunzio with affective disorder. (Tr. 83, 84) He then evaluated

1 Denunzio's "B" listing criteria, which gauge the severity of her limitations. *See* 20 C.F.R. §§
2 404.1520a(c)(3), 416.920a(c)(3). Kerns found Denunzio has "mild" restrictions of her daily
3 activities; "mild" difficulties in maintaining social functioning; "mild" difficulties in
4 maintaining concentration, persistence, or pace; and no evidence of decompensation. (Tr. 84)
5 Kerns further opined that the medical evidence did not establish the presence of the "C" criteria,
6 which are an alternative gauge of the extent of her mental impairment. (Tr. 84) Kerns
7 concluded that Denunzio's mental impairment is non-severe. (Tr. 84)

8 In February of 2013, Denunzio was examined by Glenn Marks, Ph.D., for the disability
9 determination services. (Tr. 74) Marks reported that Denunzio "presented with a stable mood
10 and a varied affect." (Tr. 374) "Although she reported that she felt like she was having one of
11 her panic-type episodes, there was no evidence of it." (Tr. 374) Her "[t]hought processes
12 appear linear, logical and goal directed with no evidence of atypical thought processes." (Tr.
13 374) Marks diagnosed bipolar disorder and anxiety disorder, NOS. (Tr. 374) He listed her
14 GAF (global assessment of functioning) as 55 to 60. (Tr. 374)

15 Marks opined that Denunzio had mild restriction in her ability to understand and
16 remember complex instructions, carry out complex instructions, and make judgments on
17 complex work-related decisions. (Tr. 368) She had mild restriction in her ability to interact
18 appropriately with the public, supervisors, or co-workers. (Tr. 369)

19 The medical record contains treatment notes from Denunzio's treating psychiatrist,
20 Steven J. Bupp, M.D., beginning in 2009 and extending through 2016. (Tr. 264- 352, 844-886)

21 In January of 2013, Bupp completed a Medical Assessment form assessing Denunzio's
22 ability to perform work-related activity. (Tr. 362-67) He rated Denunzio as having moderately
23 severe impairment in the following areas: relating to other people, restriction of daily activities,
24 responding appropriately to supervision in a work setting, responding to customary work
25 pressures, performing complex tasks, performing varied tasks, and completing a normal work
26 day/week without interruptions from psychologically based symptoms and to perform at a
27 consistent pace without an unreasonable number/length of rest periods. (Tr. 362-363); (Tr.
28 486-487) Bupp also rated Denunzio as having moderate impairment in the areas of:

1 deterioration in personal habits; constriction of activities; ability to understand, carry out, and
2 remember instructions in a work setting; respond appropriately to co-workers; and perform
3 repetitive tasks. *Id.*

4 In January of 2013, Bupp also completed a Mental Residual Functional Capacity
5 Assessment for Denunzio. (Tr. 364-365); (Tr. 486-487) He rated Denunzio as markedly
6 limited in her ability to: carry out detailed instructions, maintain attention and concentration for
7 extended periods, perform activities within a schedule, maintain regular attendance and be
8 punctual, sustain a routine without special supervision, complete a normal workday and
9 workweek without interruptions from psychologically based symptoms and to perform at a
10 consistent pace, maintain socially appropriate behavior, respond appropriately to changes in the
11 work setting, and set realistic goals or make plans independently of others. *Id.* Bupp also rated
12 Denunzio as moderately limited in her ability to: remember locations and work procedures,
13 understand and remember detailed instructions, work in coordination with others without being
14 distracted, accept instructions and respond appropriately to criticism from supervisors, get along
15 with peers without distracting them or exhibiting behavioral extremes, be aware of normal
16 hazards and take precautions, and travel in unfamiliar places or use public transportation. *Id.*

17 Bupp indicated that his conclusions were based on Denunzio's self-reports, reports of
18 others, and his own observations. (Tr. 366-367) He opined that Denunzio's short term memory
19 is limited because she fails to work consistently and accurately. *Id.* He opined that her
20 understanding is limited because of her frustration with failure. *Id.* He believes her sustained
21 concentration is limited due to the limited duration of her concentration and her intermittent
22 functioning, which has not changed with treatment. *Id.* Bupp finds her persistence is limited
23 because she lacks motivation, interest, or joy. *Id.* Moreover, she is inconsistent and experiences
24 anxiety. *Id.* Her social interaction is limited because she fears social interaction, has trouble
25 assessing social cues, and has poor reactions to social situations. *Id.* Her adaptation is limited
26 because she fails to make accurate assessments, fails to act quickly, fails to foresee adaptation
27 needs, and has difficulty with the rate of change. *Id.* Bupp diagnosed Denunzio with bipolar
28 affective disorder. (Tr. 367) He rated her GAF at 55. *Id.*

1 In April of 2016, Bupp completed a second assessment of Denunzio's ability to perform
2 work-related activity. (Tr. 896-898) He found her to have severe limits in her ability to:
3 understand and remember detailed instructions, work in coordination with or proximity to
4 others, complete a normal workday and workweek without interruptions from psychologically
5 based symptoms and perform at a consistent pace, respond appropriately to changes in the work
6 setting, and be aware of normal hazards and take appropriate precautions. (Tr. 896-898) She
7 has moderately severe limits in her ability to remember locations and work-like procedures,
8 carry out detailed instructions, maintain attention and concentration, perform activities within
9 a schedule, maintain regular attendance and be punctual within customary tolerances, sustain
10 ordinary routine without supervision, interact appropriately with the public, accept instructions
11 and respond appropriately to criticism from supervisors, get along with co-workers or peers,
12 maintain socially appropriate behavior, travel to unfamiliar places or use public transportation,
13 and set realistic goals or make plans independently of others. *Id.* Bupp opined that Denunzio
14 is likely to miss work more than three times a month. (Tr. 899) Bupp explained that his
15 assessment is caused by her "severely brittle bipolar condition with recent prolonged medical
16 hospitalization for life threatening drug reaction to Lamictal." (Tr. 899)

17

18

Hearings

19

On January 16, 2013, Denunzio appeared with counsel at a hearing before ALJ Buls.
20 (Tr. 60) She testified that she was born in June of 1964. (Tr. 63) She has a high school
21 education. (Tr. 64) In 2009, she worked in a grocery store as a stocker and cashier. (Tr. 65-66)

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Denunzio received unemployment benefits up to the second quarter of 2011. (Tr. 66)
23 She stated that if she had been offered a job she would have taken it, but she did not know if she
24 would have been able to work eight hours a day. (Tr. 75) She stated, "[S]ometimes I just can't
25 keep focused on it. My mind just - - it wanders, and it's very hard for me. And if I don't
26 understand something or I was told to do something it would frustrate me." (Tr. 75)

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Denunzio testified that she cannot work because her medicines make her tired and give
28 her severe headaches and nausea. (Tr. 67) Also, she has severe panic attacks. (Tr. 67) If she

1 is having a good day, she will “go outside, walk, go to the store, come home.” (Tr. 68) If she
2 is having a bad day, she will stay in bed and sleep. (Tr. 68) Sometimes she neglects the laundry
3 and housekeeping for more than two weeks. (Tr. 68) She can cook, crochet, and watch
4 television. (Tr. 68) She goes to the store or the library with her roommate. (Tr. 68) She can
5 spend 45 minutes in the grocery store, but if it is too crowded, she will have to leave. (Tr. 69)
6 She stated, “I can’t breathe, I feel like everybody’s closing in on me and I get out, break out into
7 hot sweats.” (Tr. 69)

8 Denunzio takes medication, but she experiences side effects such as severe headaches
9 and nausea. (Tr. 70) If she has a headache, she will lay down in a dark room for an hour or so.
10 (Tr. 70) She had bipolar symptoms in 2005. (Tr. 71) Since then, she has experienced
11 depression and anxiety. (Tr. 71) She spends three out of seven days in bed crying. (Tr. 71)

12 In 2010, Denunzio took some skills classes four or five hours a day for about four
13 months. (Tr. 72-73) She could not get any help from her instructor, so she did not finish the
14 program. (Tr. 73) She can read the newspaper, but if she tries to learn something, she needs
15 to get help or she will become frustrated. (Tr. 73-74) She can watch a two-hour movie, but she
16 might not understand it. (Tr. 74)

17 On May 9, 2016, Denunzio appeared with counsel before ALJ Davis. (Tr. 407) Miriam
18 Sherman, M.D., testified as an expert. (Tr. 387, 409) Sherman agreed with the diagnosis of
19 generalized anxiety disorder. (Tr. 401-411) She stated that Denunzio’s impairments do not
20 meet or equal a listing. (Tr. 411) Sherman opined that Denunzio has mild restrictions of daily
21 activities, moderate difficulty maintaining social functioning, mild difficulty maintaining
22 concentration, and no episodes of decompensation. (Tr. 411-412) She has some limitations in
23 contact with the public. (Tr. 411-412) Sherman stated that Bupp’s records from January 2013
24 are not internally consistent. (Tr. 412) Bupp stated that many of Denunzio’s limitations are
25 marked. (Tr. 412) He stated one month later, however, that “there are no problems with
26 concentration.” (Tr. 413); (Tr. 422)

27 Christopher Salvo testified as a vocational expert. (Tr. 409, 416) Salvo considered a
28 hypothetical claimant limited to simple, routine tasks and occasionally more complex tasks with

1 only occasional contact with the general public on a superficial work basis. (Tr. 417-418) Such
2 a person could not perform Denunzio's past relevant work as a retail cashier/checker. (Tr. 417-
3 418) Such a person could work as a small products assembler, DOT code 706.684-022, a
4 production assembler, DOT code 706.687-010, or car washer, DOT code 915.663-010. (Tr.
5 418) Salvo testified that a person with marked functional limitations or moderately severe
6 functional limitations as described by Bupp would not be able to perform any work. (Tr. 419-
7 421) Salvo further testified that a person could not miss two days of work per month and
8 remain employed. (Tr. 433)

9 Denunzio testified that she suffers from panic attacks. (Tr. 423) She feels like she can't
10 breathe; she has pains in her chest; she sweats, gets nervous, and shakes. (Tr. 423) If she gets
11 an attack, she does breathing techniques. (Tr. 424) She tried to kill herself with Ativans in
12 2003, so she cannot get medication to treat the attacks. (Tr. 424) She gets attacks two to three
13 times a month. (Tr. 424) They last 20 minutes to an hour and a half or longer. (Tr. 424) Stress
14 brings on the attacks. (Tr. 424-425) Every few months she has a bout of depression when she
15 cries a lot and stays in bed a lot. (Tr. 425)

16

17 **CLAIM EVALUATION**

18 Social Security Administration (SSA) regulations require that disability claims be
19 evaluated pursuant to a five-step sequential process. 20 C.F.R. §§ 404.1520, 416.920. The first
20 step requires a determination of whether the claimant is engaged in substantial gainful activity.
21 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). If so, then the claimant is not disabled, and
22 benefits are denied. *Id.*

23 If the claimant is not engaged in substantial gainful activity, the ALJ proceeds to step
24 two, which requires a determination of whether the claimant has a severe impairment or
25 combination of impairments. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). In making a
26 determination at step two, the ALJ uses medical evidence to consider whether the claimant's
27 impairment significantly limits or restricts his or her physical or mental ability to do basic work
28 activities. *Id.* If the ALJ concludes the impairment is not severe, the claim is denied. *Id.*

1 Upon a finding of severity, the ALJ proceeds to step three, which requires a
2 determination of whether the impairment meets or equals one of several listed impairments that
3 the Commissioner acknowledges are so limiting as to preclude substantial gainful activity. 20
4 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4); 20 C.F.R. Pt. 404, Subpt. P, App.1. If the claimant's
5 impairment meets or equals one of the listed impairments, then the claimant is presumed to be
6 disabled, and no further inquiry is necessary. *Ramirez v Shalala*, 8 F.3d 1449, 1452 (9th Cir.
7 1993). If the claimant's impairment does not meet or equal a listed impairment, evaluation
8 proceeds to the next step.

9 The fourth step requires the ALJ to consider whether the claimant has sufficient residual
10 functional capacity (RFC)¹ to perform past relevant work. 20 C.F.R. §§ 404.1520(a)(4),
11 416.920(a)(4). If yes, then the claim is denied. *Id.* If the claimant cannot perform any past
12 relevant work, then the ALJ must move to the fifth step, which requires consideration of the
13 claimant's RFC to perform other substantial gainful work in the national economy in view of
14 claimant's age, education, and work experience. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4).

15

16 The ALJ's Findings

17 At step one of the disability analysis, ALJ Davis found Denunzio "has not engaged in
18 substantial gainful activity since November 1, 2009, the alleged onset date. . ." (Tr. 389) At
19 step two, he found Denunzio "has the following severe impairments: anxiety disorder; mood
20 disorder. . ." (Tr. 389)

21 At step three, the ALJ found Denunzio's impairments did not meet or equal the criteria
22 for any impairment found in the Listing of Impairments, Appendix 1, Subpart P, of 20 C.F.R.,
23 Part 404. (Tr. 390)

24 The ALJ then analyzed Denunzio's residual functional capacity (RFC). He found "the
25 claimant had the residual functional capacity to perform the full range of work at all exertional

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27 ¹ Residual functional capacity is defined as that which an individual can still do despite
28 his or her limitations. 20 C.F.R. §§ 404.1545, 416.945.

1 levels but with the following non-exertional limitations: limited to simple repetitive tasks;
2 occasional ability to perform complex tasks; and occasional interaction with the general public.”
3 (Tr. 392)

4 At step four, the ALJ found Denunzio is unable to perform any past relevant work. (Tr.
5 398) At step five, the ALJ found, based on the testimony of the vocational expert, that,
6 considering her age, education, work experience, and residual functional capacity, Denunzio
7 can work as an assembler of small products, DOT: 706.684-022, a production assembler, DOT:
8 706.687-010, or a car washer, DOT: 915.663-010. (Tr. 399)

9

10 STANDARD OF REVIEW

11 To qualify for disability benefits the claimant must demonstrate, through medically
12 acceptable clinical or laboratory standards, an inability to engage in substantial gainful activity
13 due to a physical or mental impairment that can be expected to last for a continuous period of
14 at least twelve months. 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). “An individual shall be
15 determined to be under a disability only if [her] physical or mental impairment or impairments
16 are of such severity that [she] is not only unable to do [her] previous work but cannot,
17 considering [her] age, education, and work experience, engage in any other kind of substantial
18 gainful work which exists in the national economy, regardless of whether such work exists in
19 the immediate area in which [she] lives, or whether a specific job vacancy exists for [her] or
20 whether [she] would be hired if [she] applied for work.” 42 U.S.C. §§ 423(d)(2)(A),
21 1382c(a)(3)(B).

22 The findings of the Commissioner are meant to be conclusive. 42 U.S.C. §§ 405(g),
23 1383(c)(3). The decision to deny benefits “should be upheld unless it contains legal error or is
24 not supported by substantial evidence.” *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007).
25 Substantial evidence is defined as “such relevant evidence as a reasonable mind might accept
26 as adequate to support a conclusion.” *Id.* It is “more than a mere scintilla but less than a
27 preponderance.” *Id.*

28

1 “Where evidence is susceptible to more than one rational interpretation, the
2 [Commissioner’s] decision should be upheld.” *Orn*, 495 F.3d at 630. “However, a reviewing
3 court must consider the entire record as a whole and may not affirm simply by isolating a
4 specific quantum of supporting evidence.” *Id.*

5 The Commissioner need not accept the claimant’s subjective testimony of disability, but
6 if she decides to reject it, she must justify her decision. *Valentine v. Comm’r Soc. Sec. Admin.*,
7 574 F.3d 685, 693 (9th Cir. 2009). “[W]ithout affirmative evidence showing that the claimant
8 is malingering, the Commissioner’s reasons for rejecting the claimant’s testimony must be clear
9 and convincing.” *Id.* “If an ALJ finds that a claimant’s testimony relating to the intensity of
10 [her] pain and other limitations is unreliable, the ALJ must make a credibility determination
11 citing the reasons why the testimony is unpersuasive.” *Id.* “The ALJ must specifically identify
12 what testimony is credible and what testimony undermines the claimant’s complaints.” *Id.* “In
13 this regard, questions of credibility and resolutions of conflicts in the testimony are functions
14 solely of the [Commissioner].” *Id.*

15

16 Discussion: Treating Physician

17 Denunzio first argues that the ALJ improperly discounted the opinion of disability given
18 by her treating physician, Steven J. Bupp, M.D. “Because treating physicians are employed to
19 cure and thus have a greater opportunity to know and observe the patient as an individual, their
20 opinions are [ordinarily] given greater weight than the opinions of other physicians.” *Smolen*
21 *v. Chater*, 80 F.3d 1273, 1285 (9th Cir. 1996). If the treating physician’s opinions are
22 uncontradicted, the ALJ may disregard them only after giving clear and convincing reasons for
23 doing so. *Id.* The ALJ may reject the treating physician’s contradicted opinion only if he sets
24 forth “specific and legitimate reasons supported by substantial evidence in the record.” *Lester*
25 *v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996) (punctuation modified). In this case, Bupp’s opinion
26 of disability is contradicted by the medical opinions of the testifying medical consultant, the
27 examining consultant, and the non-examining state agency physician. Accordingly, the ALJ’s
28 decision to discount Bupp’s opinion must be supported by “specific and legitimate reasons

1 supported by substantial evidence in the record.” *Lester v. Chater*, 81 F.3d 821, 830 (9th
2 Cir.1996) (punctuation modified). The court finds that the ALJ failed to do so, and Bupp’s
3 opinions were discounted erroneously.

4 The ALJ explained that he gave Bupp’s opinions “[l]ittle weight” because “evidence
5 indicated medications were helpful, her mood was ‘ok’, memory was intact, and she was
6 ‘stable.’” (Tr. 394-395) Furthermore, the medical records indicated that Denunzio “functioned
7 fairly well, but with some episodes of increased symptoms. . . .” The ALJ, however,
8 misunderstands Denunzio’s condition. That is why he finds inconsistency in the record where
9 none exists.

10 Denunzio’s functional limitations are not constant. She experiences periods of relatively
11 high functioning punctuated by episodes of debilitating impairment. Bupp characterized her
12 impairment as a “[s]everely brittle bipolar condition,” and the medical record supports that
13 characterization. (Tr. 899) For example, on March 18, 2010, Bupp noted that Denunzio’s
14 symptoms were “stable” and that “the meds help a lot.” (Tr. 266) Nevertheless, he also noted
15 that her symptoms “range moderate to severe at times.” (Tr. 266) On September 21, 2010,
16 Bupp found Denunzio “stable” and “doing well overall” with “no psych problems beyond
17 baseline.” (Tr. 272) Nevertheless, he added this cautionary note, “Still a challenge every hour.”
18 (Tr. 272) Accordingly, it is not unexpected that the medical record contains reports that her
19 medications were helpful or that her mood was “ok” or that she was “stable.” She might be
20 “stable” for periods of a week or two, but unfortunately she does not stay that way. Bupp’s
21 analysis of Denunzio’s condition is not inconsistent with the medical record. *See* (Tr. 305)

22 The ALJ further noted that in Exhibit 16F/1, (Tr. 626), “claimant denied anxiety and
23 depression.” (Tr. 395) Taken in context, this report does not contradict Bupp’s assessment of
24 Denunzio’s mental impairment. On April 1, 2016, Denunzio was examined by Basel Skeif,
25 M.D., for a follow-up examination after recent hospitalization for pericarditis. (Tr. 626-628)
26 In a rather lengthy list of possible symptoms, she reported, among other things, “[n]o anxiety,
27 no depression, and no sleep disturbances.” (Tr. 627) The ALJ seems to believe that this
28 statement contradicts Bupp’s assessment of Denunzio’s chronic mental impairment. It does not.

1 Denunzio was being seen in a follow-up to hospitalization for pericarditis. She was seeing a
2 heart specialist, not a psychiatrist. Accordingly, when she stated she had “[n]o anxiety, no
3 depression, and no sleep disturbances,” she was commenting on her present condition. She was
4 not assessing her long term mental impairment. The fact that Denunzio was experiencing no
5 anxiety, depression, or sleep disturbances in the last week of March 2016 is not a legitimate
6 reason to discount Bupp’s evaluation of Denunzio’s mental condition.

7 The ALJ also noted that the record contains “consistent” reports that Denunzio had a
8 GAF score of 55. (Tr. 395) A GAF (global assessment of functioning) score of 51-60 indicates
9 “Moderate symptoms . . . OR moderate difficulty in social, occupational, or school functioning.”
10 (Tr. 395) The ALJ noted that “GAF assessments are not correlated to the regulatory definition
11 of disability, have not been shown to be objective, and cannot be directly used to assess
12 disability.” (Tr. 395) Nevertheless, the ALJ seemed to believe that GAF scores of 55 are
13 inconsistent with Bupp’s opinion of disability. They are not.

14 As the court noted above, Denunzio’s functional limitations are not constant.
15 Denunzio’s GAF score of 55 is indicative of her baseline mental state. It is not indicative of her
16 frequent episodes of debilitating symptoms. For example, on September 25, 2014, Denunzio
17 appeared for a routine appointment. (TR. 872) She reported poor sleep, anxiety attacks that are
18 “twice as bad and occur daily,” and “brain scatter [that] still happens (every day).” (Tr. 872)
19 Bupp noted that “[h]er [symptoms] are moderate to severe in nature (worse with legal
20 pressure).” *Id.* Nevertheless, he rated her GAF score as 55, moderate symptoms. (Tr. 872)
21 This score is indicative of her mental state when her acute symptoms have subsided and she is
22 able to report for medical treatment. The numerous GAF scores of 55 in the medical record are
23 not inconsistent with Bupp’s opinion of disability.

24 The ALJ notes that Bupp’s opinion of disability “was contradicted by the examining and
25 consulting physician opinions.” (Tr. 395) That is certainly true. The ALJ, however, seems to
26 imply that this contradiction is a legitimate reason to discount Bupp’s opinions. That is not
27 correct. The contradiction does, however, trigger a different standard of review. If the treating
28 physician’s opinions are uncontradicted, the ALJ may disregard them only after giving clear and

1 convincing reasons for doing so. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.1996). The ALJ
2 may reject a treating physician's *contradicted* opinion if he sets forth "specific and legitimate
3 reasons supported by substantial evidence in the record." *Id.* (punctuation modified).

4 Here, the treating physician's opinions are contradicted by the opinions of the examining
5 and consulting physicians. Therefore, the ALJ can discount the treating physician's opinions
6 if he advances "specific and legitimate reasons supported by substantial evidence in the record."
7 See *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.1996). But the fact that a contradiction between
8 the opinions exists is not a specific and legitimate reason all by itself.

9 The ALJ further noted that Bupp's opinion as to Denunzio's marked functional
10 limitations are contradicted by Marks' observations that Denunzio showed no problems with
11 concentration on the day of his examination. (Tr. 397) As the court noted above, however, this
12 is not a contradiction. Denunzio's symptoms wax and wane. They are not constant. That is
13 why the Commissioner ordinarily gives treating physicians deference. They can observe the
14 claimant's symptoms over a long period of time, something that a consulting examiner is unable
15 to do.

16 The Commissioner argues that Bupp's opinion of disability may be discounted because
17 he expressed his opinions "on a check-the-box form with little explanation for the basis of the
18 rating." (Doc. 20, p. 18) Also, the Commissioner argues that Bupp's opinion can be discounted
19 because it was based in part of Denunzio's self-reporting of symptoms and limitations, and she
20 is not a credible source. *Id.* Neither of these arguments was advanced by the ALJ, and
21 therefore this court cannot consider them. *Garrison v. Colvin*, 759 F.3d 995, 1010 (9th Cir.
22 2014). The ALJ did note that Bupp's opinions were based "on claimant's own report, reports
23 of others and direct observation." (Tr. 395) But he did not argue that this was a reason for
24 discounting Bupp's opinions.

25

26 Discussion: Claimant's Testimony

27 Denunzio further argues that the ALJ erred when he improperly discounted her testimony
28 about the severity of her symptoms.

If there is medical evidence of underlying impairments “and there is no evidence of malingering, then the ALJ must give specific, clear and convincing reasons in order to reject the claimant’s testimony about the severity of the symptoms.” *Molina v. Astrue*, 674 F.3d 1104, 1112 (9th Cir. 2012) (punctuation modified). “At the same time, the ALJ is not required to believe every allegation of disabling pain, or else disability benefits would be available for the asking” *Id.* “In evaluating the claimant’s testimony, the ALJ may use ordinary techniques of credibility evaluation.” *Id.* “For instance, the ALJ may consider inconsistencies either in the claimant’s testimony or between the testimony and the claimant’s conduct, unexplained or inadequately explained failure to seek treatment or to follow a prescribed course of treatment, and whether the claimant engages in daily activities inconsistent with the alleged symptoms.”

Id.

In this case, the ALJ found that while “claimant’s medically determinable impairments could reasonably be expected to cause the alleged symptoms,” her “statements concerning the intensity, persistence and limiting effects of these symptoms are not entirely consistent with the medical evidence and other evidence in the record for the reasons explained in this decision.” (Tr. 393-394) The court finds that while there appear to be inconsistencies in the record, these inconsistencies result from the capricious nature of her impairment and do not constitute clear and convincing reasons for discounting Denunzio’s subjective testimony of disability.

As the court noted above, Denunzio’s symptoms wax and wane. Therefore, it is to be expected that the medical record will contain numerous entries indicating her symptoms are “stable,” she is doing well, and she experiences no side effects from her medications. Unfortunately these periods are punctuated by episodes of increased anxiety and recurring panic attacks. In fact, the ALJ seemed to acknowledge this. At one point in his decision, the ALJ noted that “claimant reported she was doing well and had no side effects from her medications.” (Tr. 394) Nevertheless, in the next sentence, the ALJ reported that “[s]he had some episodes of increased anxiety and panic attacks” (Tr. 394) And then, the ALJ conceded that “[n]ew medication caused lightheadedness and gastrointestinal issues, and had to be changed.” (Tr. 394)

1 In his decision, the ALJ highlighted those entries where Denunzio is reported to be
2 “stable” or “doing well.” They certainly exist, but they do not justify his decision to discount
3 her testimony as to the severity of her symptoms. *See, e.g., Garrison v. Colvin*, 759 F.3d 995,
4 1017 (9th Cir. 2014) (“As we have emphasized while discussing mental health issues, it is error
5 to reject a claimant’s testimony merely because symptoms wax and wane in the course of
6 treatment.”).

7 Similarly, the ALJ concludes that Denunzio’s record of daily activities is inconsistent
8 with her subjective testimony of disability. According to the ALJ, “[t]he evidence consistently
9 indicates that the claimant has no problems with personal care, and she is able to cook, clean,
10 take care of her dog, go outside, do her shopping, and manage her finances.” (Tr. 393) “She
11 reads and watches television daily when not in a manic stage, but sometimes it is hard for her
12 to think and her mind races or she is very sleepy.” (Tr. 393) The evidence, however, is not so
13 black and white.

14 Denunzio testified that she rises “between 7:00 and 9:00.” (Tr. 68) She said, “If it’s a
15 good day, I’ll shower, get dressed. I’ll go outside, walk, go to the store, come home. On a bad
16 day I just stay in bed and sleep.” (Tr. 68)

17 She reported that she cleans the house and does laundry but explained that “[s]ometimes
18 I’ll wait ‘till it piles up to more than two weeks, or I have nothing else to wear.” (Tr. 68) If she
19 needs to go to the store, her roommate will go with her. (Tr. 68) She can stay in the store for
20 45 minutes, but if it is too crowded she says, “then I have to leave because it’s too much for me
21 to absorb.” (Tr. 69) “I can’t breathe, I feel like everybody’s closing in on me and I get out,
22 break out into hot sweats.” (Tr. 69)

23 The ALJ is correct to say that Denunzio can “cook, clean, take care of her dog, go
24 outside, do her shopping and manage her finances.” The record also indicates, however, that
25 she cannot perform these tasks on a particular schedule. She can perform them if she is having
26 a good day. If she is having a bad day, she cannot. The fact that she can accomplish these
27 tasks, symptoms permitting, is not evidence that she is able to work. Neither is it clear and
28

1 convincing evidence of the type that would justify rejecting Denunzio’s testimony about the
2 severity of her symptoms. *See, e.g., Garrison v. Colvin*, 759 F.3d 995, 1017 (9th Cir. 2014).

3 In her response brief, the Commissioner advances other reasons why Denunzio’s
4 testimony should be discounted. For example, she argues that Denunzio’s received only
5 conservative treatment for her mental impairment. This court, however, may not consider
6 arguments that were not made by the ALJ. *See Garrison v. Colvin*, 759 F.3d 995, 1010 (9th
7 Cir. 2014).

8 The ALJ improperly discounted the treating physician’s opinion of disability and
9 improperly discounted Denunzio’s subjective testimony of the severity of her symptoms. The
10 final decision of the Commissioner must be reversed. Ordinarily, if the Commissioner is
11 reversed, the court should remand for further administrative proceedings. The court may,
12 however, remand for payment of benefits if “(1) the record has been fully developed and further
13 administrative proceedings would serve no useful purpose; (2) the ALJ has failed to provide
14 legally sufficient reasons for rejecting evidence, whether claimant testimony or medical opinion;
15 and (3) if the improperly discredited evidence were credited as true, the ALJ would be required
16 to find the claimant disabled on remand.” *Garrison v. Colvin*, 759 F.3d 995, 1020 (9th Cir.
17 2014).

18 Here, all three requirements are fulfilled. “The record has been fully developed and
19 further administrative proceedings would serve no useful purpose.” *Garrison*, 759 F.3d at
20 1020. In fact, the record contains two hearing and two ALJ decisions. As the Ninth Circuit
21 observed in *Garrison*, “our precedent and the objectives of the credit-as-true rule foreclose the
22 argument that a remand for the purpose of allowing the ALJ to have a mulligan qualifies as a
23 remand for a ‘useful purpose’ under the first part of credit-as-true analysis.” *Garrison v. Colvin*,
24 759 F.3d 995, 1021 -1022 (9th Cir. 2014)

25 Second, the ALJ failed to provide specific and legitimate reasons for discounting the
26 treating physician’s opinion of disability and failed to provide clear and convincing evidence
27 to discount Denunzio’s own testimony. *See above*. Third, if Bupp’s opinion and Denunzio’s
28 testimony were credited as true, Denunzio necessarily would be found disabled. The vocational

1 expert testified that if Denunzio had the functional limitations described by Bupp, then
2 Denunzio would be disabled. (Tr. 419-421)

3 All three parts of the *Garrison* test are fulfilled. Furthermore, the court has examined
4 the entire record and finds no reason to seriously doubt that Denunzio is disabled. *See*
5 *Garrison*, 759 F.3d at 1022-23. Accordingly, this case will be remanded for payment of
6 benefits. *See also Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004) (“Allowing the
7 Commissioner to decide the issue again would create an unfair ‘heads we win; tails, let’s play
8 again’ system of disability benefits adjudication.”).

9 IT IS ORDERED that the final decision of the Commissioner is reversed. The case is
10 remanded for payment of benefits.

11 The Clerk of the Court is directed to prepare a judgment and close this case.
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13 DATED this 9th day of April, 2018.
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17 Leslie A. Bowman
United States Magistrate Judge
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